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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1582

PHILIP L. TOIA, as Acting Commissioner of the New York State Department of Social Services,

Petitioner,

vs.

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Respondents,

and

JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1975

No. .....

PHILIP L. TOIA, as Acting Commissioner of the New York State Department of Social Services,

Petitioner,

vs.

GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Respondents,

and

JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Berger[1] prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 3, 1976, which reversed the judgment of the United States District Court for the Western District of New York, entered July 31, 1975 and remanded the cause to that Court.

Opinions Below

The Decision and Order of the District Court (HAROLD P. BURKE, D.J.), dated July 30, 1975, dismissing the action is not reported. It is set forth as Appendix "A" to this petition.

The opinion of the Court of Appeals for reversal was dated February 3, 1976 and is not reported as yet. It is set forth as Appendix "B" to this petition.

Jurisdiction

Judgment in the Court of Appeals was entered on February 3, 1976. It is set forth as Appendix "C" to this petition. After this Court's decision in *DeCanas* v. *Bica,* U. S. , 44 U.S.L.W. 4235 (No. 74-882, February 25, 1976) a motion for an enlargment of time to petition for rehearing and such a petition were submitted on behalf of petitioner. That application was denied by order of the Court of Appeals dated March 17, 1976, set forth as Appendix "D".[2]

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of *certiorari* is 28 U.S.C., § 1254 (1).

---

[1] The action had been commenced against Abe Lavine, then State Commissioner of Social Services. He has been succeeded in office and function by Philip L. Toia, Acting Commissioner (Rule 48[3]).

[2] The mandate of the Court of Appeals has not been stayed.

Questions Presented

1. Does the complaint, in which jurisdiction is alleged to be conferred by 28 U.S.C., § 1343, set forth a substantial constitutional question so as to vest the District Court with jurisdiction to hear and determine plaintiff Holley's claim that, despite the fact that she is an alien illegally in the United States, she is entitled to a grant of public assistance in the category of Aid to Families with Dependent Children (AFDC)?

2. Does such complaint set forth a substantial constitutional question on behalf of plaintiff children who seek AFDC for plaintiff Holley?

Provision of the Constitution of the United States Involved

Amendment XIV Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes of the United States Involved

42 U.S.C. § 1983

> "§ 1983. Civil action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress."

28 U.S.C. § 1343 (3)

"§ 1343. Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *"

Statute of the State of New York Involved

New York Social Services Law, § 131-k

"§ 131-k. Illegal aliens

"1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of thirty days in accordance with subdivision two of this section.

"2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is

an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the [sic] consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance." (Added L. 1974), ch. 811, § 1, effective June 7, 1974.)

Regulation of the New York State Department Of Social Services Involved

18 New York Codes, Rules and Regulations, § 349.3 (18 NYCRR § 349.3)

"349.3 Illegal aliens

"(a) Any inconsistent provisions of this Title notwithstanding, an alien who is unlawfully residing in the United States, or fails to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, is not eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of 30 days in accordance with subdivision (b) of this Action.

"(b) An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States, or because he failed to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, shall, nonetheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed 30 days from the date of such determination in order to allow time for the referral of the case to the United States Immigration and Naturalization Service, or the nearest consulate of the

country of the applicant or recipient, and for such service or consulate to take appropriate action or furnish assistance." (Added May 2, 1974, effective April 1, 1974.)

Statement of the Case

In this action, respondent Holley (herein plaintiff Holley), an alien who has been found by the United States Department of Justice, Immigration and Naturalization Service, to be "illegally in the United States" (19)[1], seeks to obtain a grant of public assistance in the category of Aid to Families with Dependent Children. Her six minor citizen children, on behalf of whom she also sues, presently receive AFDC. The State Commissioner of Social Services, by Decision After an Administrative Fair Hearing, affirmed the action of respondent Reed (hereinafter the County Commissioner), in removing plaintiff Holley from the family budget on the ground that she is an alien who is unlawfully residing in the United States and is not eligible for public assistance (New York Social Services Law, § 131-k) (21-22).

A. Background

After the decision of this Court in *Graham v. Richardson* (403 U. S. 365 [1971]) invalidating welfare durational residence requirements as to aliens lawfully in this Country, the Federal Secretary of Health, Education and Welfare issued proposed regulations to "implement" the decision.

These appeared in 37 Federal Register, p. 11977 (Friday, June 16, 1972). The proposed section 233.50 of 45 C.F.R., relating to citizenship and alienage in the AFDC and other programs, would have read as follows:

---

[1] Unless otherwise indicated, numbers in parentheses refer to pages of the "Appendix" in the Court of Appeals.

"§ 233.50 Citizenship and alienage.

"Condition for plan approval: A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act may not exclude an otherwise eligible individual on the basis that he is not a citizen, or because of his alien status."

The regulation was revised, however, specifically to exclude from its operation aliens not legally in this Country (38 Federal Register, p. 16911 [June 27, 1973]). As so revised it was promulgated on November 2, 1973 (38 Federal Register, p. 30259) and provides:

45 C.F.R. § 233.50

"§ 233.50 Citizenship and alienage.

"Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a) (7) or section 212(d) (5) of the Immigration and Nationality Act)."

After the promulgation of the Federal regulation, New York State Departmental Regulation 18 NYCRR § 349.3, relating to "illegal aliens", was added on May 2, 1974, to be effective April 1, 1974. Social Services Law, § 131-k was added by Laws of 1974, Chapter 811 and became effective June 7, 1974 upon approval by the Governor. The State statute and the Departmental Regulation do not define who is an illegal alien in recognition of the fact that it is not for the State of New York to do so but for the United States Immigration and Naturalization Service.

The Immigration and Naturalization Service has stated that plaintiff Holley "is illegally in the United States" and that "this service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with the circumstances then existing" (Exhibit A, annexed to the Complaint, 19).

B. The Complaint (9)[4]

The complaint challenges the validity of section 131-k of the New York Social Services Law, as enacted and applied, in that it is alleged to "operate to deprive aliens residing in the United States under color of law, and their families, of their right to public assistance" under the New York State AFDC program and in that it "operates to deprive plaintiffs of rights secured by the Fourteenth Amendment to the Constitution of the United States, [42 U.S.C. § 1983 of the Social Security Act and '42 U.S.C. § 301', *et seq.*][5] and regulations promulgated thereunder" (9).

The complaint alleges that plaintiff Holley is a citizen of Canada who has been a resident of the United States since 1954, presently residing in Monroe County, New York, and that her six minor children, plaintiffs on behalf of whom she also sues, are aged 14, 13, 12, 11, 9 and 1, and are citizens of the United States by birth (10); that the United States Immigration and Naturalization Service has classified plaintiff Holley "as a deportable alien" but has determined "not to deport her, for humanitarian reasons, so long as her citizen children remain dependent upon her" (11); that application to the immigration and Naturalization Service for status as an

[4] The Complaint is set out as Appendix "E".

[5] The reference to Social Security Act, 42 U.S.C. § 301, *et seq.* appears to be in error. That section relates to the Federal program of Old Age Assistance now inapplicable to the 50 States (Public Law 92-603, § 303).

immigrant alien was denied becaused as a person receiving public assistance she is ineligible for immigrant status (11); and that since 1968, plaintiff Holley has been the recipient of AFDC on behalf of her children (11). The complaint further alleges the enactment of New York Social Services Law, § 131-k, effective June 7, 1974, which provides that an alien unlawfully residing in the United States shall be ineligible for public assistance in the AFDC category (12); the implementation of such statute by Departmental Regulation 18 NYCRR § 349.3 (12); action on the part of the County Commissioner on August 20, 1974 to reduce the public assistance grant for the seven plaintiffs by the amount allocated to meet the needs of plaintiff Holley because her "alien status made her ineligible for public assistance", resulting in a loss of $50.33 per month to the "McQuoid family household" (12); the request for a departmental fair hearing and the affirmance of the County Commissioner's action by the State Commissioner (12, 13); and the marriage of plaintiff Holley on February 25, 1975 to Wayne Holley, a recipient of a "separate public assistance grant" for which eligibility is based on disability (13).

The complaint alleges four causes of action.

The unarticulated[6] constitutional claims are alleged as the third cause of action which is set out verbatim:

> "34. Plaintiffs restate, reallege and incorporate each and every allegation in paragraphs 1-33.
>
> "35. The Fourteenth Amendment to the Constitution of the United States provides that:
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

[6] Compare *Albany Welfare Rights Org. Day Care Ctr. Inc.* v. *Schreck* (463 F.2d 620, 623 [2d Cir., 1972], cert. den. 410 U.S. 944 [1973]).

law; nor deny to any person within its jurisdiction the equal protection of the laws.

"36. Section 131-k of the New York State Social Services Law, as enacted and applied by the defendants, deprives the plaintiffs of their rights to equal protection and due process of law. As a result, plaintiffs are denied rights secured by the Fourteenth Amendment to the Constitution of the United States." (16, 17).

The action was commenced in April, 1975 and the State and County Commissioners interposed motions to dismiss (24, 27).

On July 30, 1975, District Judge BURKE ordered that the action be dismissed for lack of jurisdiction over the subject matter and for failure to state a claim on which relief may be granted (46). Judgment thereon was entered in the office of the Clerk of the United States District Court for the Western District of New York on July 31, 1975 (47).

Judge BURKE held that "[t]he complaint asserts no substantial claim of unconstitutionality."

The Court of Appeals decided in favor of substantiality and reversed. In doing so, it did not characterize plaintiffs' constitutional claims as persuasive. It grounded its action, at least in part, upon a finding that this Court has never dealt with the equal protection rights of aliens in a welfare context. Thus, the issue was not deemed to be foreclosed.

Reasons for Granting The Writ

In dealing with the constitutional rights of aliens under the Fourteenth Amendment, this Court has consistently and clearly limited its decisions delineating such rights to lawfully admitted aliens only.[7]

[7] We here deal with equal protection of the laws and substantive due process. Even illegal aliens have been afforded procedural safeguards under the Due Process Clause (see *Yamataya* v. *Fisher*, 189 U.S. 86 [1903]).

Thus, in *Truax* v. *Raich* (239 U.S. 33 [1915]) it was held that under the Fourteenth Amendment a State could not "* * * deny to *lawful* inhabitants, because of their race or nationality, the ordinary means of earning a livelihood" (239 U.S. at 41) (emphasis supplied).

In *Takahashi* v. *Fish and Game Comm.* (334 U.S. 410 [1947]) it was held that the State of California could not prohibit an alien from making a living by fishing off shore. In construing the Fourteenth Amendment and 42 U.S.C. § 1981 (then 8 U.S.C. § 41) the Court held (334 U.S. at 420):

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons *lawfully* in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." (Emphasis supplied.)

And see *Flemming* v. *Nestor* (363 U.S. 603, 607 [1959]), where, in answer to a claim that discontinuance of social security benefits of a deported alien constituted punishment without judicial trial, this Court held (363 U.S. at 617) "* * * it cannot be said * * * that the disqualification of certain deportees from receipt of Social Security benefits while they are not *lawfully* in this country bears no rational connection to the purposes of the legislation * * *." (Emphasis supplied.)

It is the alien's *lawful* presence within the United States upon which his entitlement to welfare payments as a matter of equal protection of the laws is grounded. *Graham* v. *Richardson* (403 U.S. 465 [1971]).[8]

While classifications directed at lawfully admitted aliens are deemed, generally, to be suspect (*Graham* v. *Richardson*

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[8] As to an alien durational residency requirement see also *Diaz* v. *Weinberger* (361 F. Supp. 1 [S.D. Fla., 1973]) probable jurisdiction noted (416 U.S. 980 [1973]) reargument ordered (420 U.S. 959 [1975]) where the District Court assumed, without deciding, that the Congress could properly deny supplemental medical insurance benefits to aliens who are illegally residing in the United States (361 F. Supp., at p. 12).

[403 U.S. at 372]), illegal aliens stand on a different footing for, by the very nature of their presence within the Country, it is the illegal aliens themselves who are suspect. There is no inherent evil in dealing with illegal aliens in a manner which recognizes them exactly for what they are. The State, we submit, is not required to demonstrate either "a compelling state interest" (*Graham* v. *Richardson, supra*)[9] or a "rational basis" (*Dandridge* v. *Williams,* 397 U.S. 471 [1969]) in justification of its statute excluding them from AFDC welfare payments.

We had urged below that the constitutional arguments of plaintiff Holley and of plaintiff children were insubstantial and without merit (*Goosby* v. *Osser,* 409 U.S. 512 [1972]). This Court's prior holdings seemed to support our position, rejected, however, by the Court of Appeals.

Realizing that the question of substantiality is somewhat narrow in view of this Court's holdings in *Goosby* v. *Osser, supra,* and in *Hagans* v. *Lavine* (415 U.S. 528 [1973]), we had resisted the temptation to seek review of the judgment of the Court of Appeals at this time.

Two recent decisions of this Court, taken together, have convinced us that the issue of substantiality should be pursued now.

On February 25, 1976, this Court handed down its decision in *DeCanas* v. *Bica* (.... U.S. ...., 44 U.S.L.W. 4235, No. 74-882), holding that the Immigration and Naturalization Act did not preclude state authority to regulate the employment

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[9] The underlying rationale which requires a court to subject legislation to strict scrutiny on the basis of the "suspect classification" theory (as held to be required in the case of lawfully admitted aliens [*Graham* v. *Richardson, supra*]) "is that, where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down." See *Johnson* v. *Robison* (415 U.S. 361, 375, footnote 14 [1974]). Illegal aliens are not "a discrete and insular minority." The "traditional political processes" *require* their exclusion from the Country as a matter of national policy.

of illegal aliens. Since a state may constitutionally prohibit the employment of illegal aliens, it would seem to follow that there is no constitutional requirement that a state furnish welfare to an illegal alien.[10]

True it is that *DeCanas* did not apparently deal with equal protection and substantive due process claims.

However, on March 29, 1976 this Court denied certiorari in *Alonso* v. *Dept. of Human Resources* (123 Cal. Reptr. 536, Cal. Ct. of App., July 30, 1975, pet. for hearing den. [Cal. Sup. Ct., September 24, 1975, cert. den. 44 U.S.L.W. 3544]), which held that an illegal alien was not entitled to unemployment insurance benefits. The California Court of Appeals had explored the constitutional aspects of the case. It held, *inter alia,* after discussing *Truax, Takahashi* and *Graham, supra* (p. 540):

> "However, the common thread running through the above referenced cases involving employment of aliens is that they refer to 'lawfully resident' aliens. If an alien is here *unlawfully,* he has no rights under the Constitution of the United States to equal opportunity of employment as enjoyed by lawfully resident aliens (see *Pilapil* v. *Immigration and Naturalization Service* (10th Cir., 1970) 424 F. 2d 6. 11) and has no right to work." [11]

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[10] The petition for rehearing filed with the Court of Appeals was grounded upon *DeCanas.*

[11] Compare (*Commercial Standard Fire and Marine Co.* v. *Galindo* (Texas, 484 S.W. 2d 635 [1972], application for a writ of error refused) holding that an illegal alien, whose contract of employment did not aid him in his illegal entry had capacity to contract for his employment and to sue for Workmen's Compensation benefits which were awarded to him. The Texas Court apparently construed this Court's decision in *Takahashi* erroneously for it held that 42 U.S.C. § 1981 applied to illegal aliens. *Takahashi,* however, applied the section only to "persons lawfully in this country." See also *Dezsofi* v. *Jacoby* (178 Misc. 851 [Sup. Ct., N.Y. Co., 1942]); *Martinez* v. *Fox Valley Bus Lines, Inc.* (17 F. Supp. 576 [N.D., Ill., 1936]).

DeCanas and *Alonso* clearly follow the prior holdings of this Court that it is only the lawfully admitted alien who may assert substantive rights under the Fourteenth Amendment.

In apparent recognition of the insubstantiality of her own constitutional arguments, plaintiff Holley made separate arguments on behalf of her children in the Court below.

Plaintiff children argued below[12] that "New York has created two classes of dependent children under its A.F.D.C. state plan: (1) those children residing with a parent who is a legal resident of the United States; and (2) those children residing with a parent who is not a legal resident of the United States." We submit that such argument is an attempt to obtain welfare for plaintiff Holley through the back door which she has no constitutional right to obtain through the front door.

What is here involved is the implementation of Federal and State policy which excludes illegal aliens from access to the public fisc. As to State action, which follows the path set down by the Federal Secretary of Health, Education and Welfare, such exclusion is entirely rational (*Dandridge* v. *Williams, supra, Jefferson* v. *Hackney* [406 U.S. 535 (1972)]). The arguments of plaintiff children are the same as those of plaintiff Holley and are subject to the same infirmities.

Plaintiffs' constitutional arguments are wholly and clearly insubstantial (*Truax* v. *Reich, supra; Takahashi* v. *Fish and Game Comm., supra; Flemming* v. *Nestor, supra; Graham* v. *Richardson, supra; DeCanas* v. *Bica, supra; Alonso* v. *Dept. of Human Resources, supra*). The Court below erred in holding to the contrary (*Goosby* v. *Osser, supra; Hagans* v. *Lavine, supra*).

[12] The constitutional argument was set out in plaintiffs' brief, not in the complaint.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: April 19, 1976

Respectfully submitted,

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APPENDIX "A"

(Decision and Order of the District Court)

UNITED STATES DISTRICT COURT
Western District of New York

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Plaintiffs,

vs.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants.

Civil 75-151

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The complaint herein was filed April 17, 1975. The action challenges the validity of Section 131K of the New York

Social Services Law which provides that aliens unlawfully residing in the United States are ineligible for public assistance benefits under the federally funded program of Aid to Dependent Children, and the regulations of the New York State Department of Social Services promulgated thereunder (Section 349.3 of Title 18 of the New York Code of Rules and Regulations). The complaint alleges that jurisdiction is conferred by 28 U.S.C. 1343 (Civil Rights Act) and by 28 U.S.C. 1331, the amount in controversy exceeding $10,000.00 and arising under the constitution and laws of the United States.

On April 17, 1975, simultaneous with the filing of the complaint, this Court directed the defendants to show cause why an order should not be issued granting a preliminary injunction requiring the defendant Reed to restore the grant of aid to dependent children for the plaintiff's family household to the level to which they would be entitled but for the removal of the plaintiff Gayle McQuoid Holley from the grant pursuant to the December 19, 1974 administrative decision of the defendant Lavine, pending a final disposition of this action, and why this Court should not convene a three judge Court. The defendant Reed filed a notice of motion and a motion to dismiss with supporting papers. The motions were heard before this Court on oral argument and were submitted on written memoranda.

The suit is an attack on a state statute and state regulation, not on action taken under the statute and regulation. The complaint is against the state and County of Monroe, not against the Commissioner of the New York State Department of Social Services as an individual, nor against the Commissioner of the Monroe County Department of Social Services as an individual. Neither the state commissioner nor the

county commissioner are within the scope of Section 1933. Rosado vs. Wyman, 414 F.2d. 170, 178.

The complaint asserts no substantial claim of unconstitutionality. There is no showing that the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

ORDERED that the action is dismissed for lack of jurisdiction over the subject matter and because the complaint fails to state a claim upon which relief may be granted.

HAROLD P. BURKE,
Harold P. Burke,
United States District Judge.

July 30, 1975.

"Entered July 31, 1975"

APPENDIX "B"

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS
For the Second Circuit

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID and ADELAINE McQUOID, her minor children,

Plaintiff-Appellant,

against

ABE LAVINE, as Commissioner of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, and JAMES REED, as Commissioner of the MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

No. 424—September Term, 1975.
(Argued January 9, 1976
Decided February 3, 1976.)
Docket No. 75-7468

Before: Anderson, Feinberg and Mulligan, *Circuit Judges.*

Appeal from dismissal by United States District Court for the Western District of New York, Harold P. Burke, *J.*, of complaint that New York statute denying welfare benefits to illegal alien permitted to remain in United States for humanitarian reasons violates equal protection clause, and federal statutes and regulations.

Reversed and remanded.

K. Wade Eaton, Greater Up-State Law Project, Rochester, N.Y., *for Appellant.*

Alan W. Rubenstein, Principal Attorney (Louis J. Lefkowitz, Attorney General of the State of New York; Jean M. Coon, Assistant Solicitor General; Charles G. Finch, Chief Counsel, Charles G. Porreca, Monroe County Department of Social Services, on the briefs), *for Appellees.*

Per Curiam:

Gayle McQuoid Holley, individually and on behalf of her six children, appeals from a judgment of the United States District Court for the Western District of New York, Harold P. Burke, *J.*, dismissing her complaint against defendants Abe Lavine, Commissioner of the New York State Department of Social Services, and James Reed, Commissioner of the Monroe County Department of Social Services. Appellant is a Canadian citizen and an "illegal alien" but her six children are all American citizens, having been born here. Her complaint seeks an order requiring defendants to restore welfare benefits under the Aid to Families with Dependent Children (AFDC) program and invalidating section 131-k of the New York Social Services Law, insofar as it deprives certain illegal aliens of AFDC benefits.[1] Judge Burke dismissed the com-

[1] New York Social Services Law § 131-k provides:

§ 131-k. Illegal aliens

1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of thirty days in accordance with subdivision two of this section.

2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or

(Footnote continued on following page)

plaint for lack of jurisdiction and failure to state a claim on which relief could be granted.

Appellant argues that the district court had subject matter jurisdiction under both 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3), the jurisdictional counterpart of the Civil Rights Act of 1871, 42 U.S.C. § 1983. As to the former, the district court held that the amount in controversy did not exceed $10,000, a conclusion with which we agree. *Rosado* v. *Wyman*, 414 F.2d 170, 176, 181 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 397 (1970).[2] Judge Burke also held, however, that "Neither the state commissioner nor the county commissioner," sued in their official capacities, "are within the scope of Section 1983" and that, in any event, "The complaint asserts no substantial claim of unconstitutionality." The former holding is incorrect under *McMillan* v. *Board of Education*, 430 F.2d 1145, 1148-49 (2d Cir. 1970), and *Erdmann* v. *Stevens*, 458 F.2d 1205, 1208 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

Whether plaintiff has alleged a constitutional claim under section 1983 that is substantial enough to confer jurisdiction is a closer question. Although here illegally, plaintiff for many

(Footnote continued from preceding page)

medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance.

[2] In *Rosado*, as here, plaintiffs unsuccessfully argued that the amount of monthly benefits in controversy should be multiplied by the number of months they would presumably remain on welfare. See *Rosado* v. *Wyman*, 304 F.Supp. 1356, 1363 (S.D.N.Y. 1969).

years has been allowed by the Immigration and Naturalization Service to remain for humanitarian reasons, to prevent the separation of mother and children. Her constitutional claim is that denial of welfare benefits unfairly discriminates against at least those presumably few illegal aliens in plaintiff's unusual situation, thus denying the equal protection of the laws to her in her own right and also to her children, who, though citizens, are similarly penalized by a one-seventh reduction of welfare going to the household. Under the minimal standards laid down by *Hagans* v. *Lavine*, 415 U.S. 528 (1974), and *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973), we cannot say that the claims are wholly insubstantial or obviously frivolous or that decisions of the Supreme Court foreclose the subject. The Supreme Court has apparently never dealt with the equal protection rights of illegal aliens in this context. Cf. *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971); see also *Bolanos* v. *Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975). Nor is the claim that children whose parents are illegal aliens have their own rights to benefits an insubstantial one. Cf. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). We do not characterize plaintiff's constitutional arguments as persuasive; we hold merely that the district judge could not dismiss them out of hand.

We therefore reverse the judgment of the district court and remand for further proceedings. Plaintiff's constitutional claims can only be considered by a three-judge court. 28 U.S.C. § 2281. However, plaintiff also alleges that section 131-k, see note 1 *supra*, conflicts both with the Social Security Act, 42 U.S.C. §§ 601, 602(a)(10), and 606(b)(1), and with an HEW regulation, 45 C.F.R. § 233.50. The statues cited are alleged to require aid to be given to the parents or relations of needy dependent children with whom they are living.[3] The

[3] 42 U.S.C. § 601 authorizes appropriations:

> For the purpose of encouraging the care of dependent children . . . by enabling each State to furnish financial assistance and rehabilitation

(Footnote continued on following page)

regulation provides that public assistance shall be given to persons otherwise eligible who are either citizens or aliens "lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law," including parolees and certain refugees. According to plaintiff, since the immigration authorities have allowed her to stay, she resides here "under color of law". We do not pass upon the merits of these claims of conflict between New York State and federal law or appellees' response thereto. We note only that since pendent jurisdiction exists over them, the district judge, sitting alone, may well want to consider and rule upon these claims before convening the three-judge Court. *Hagans* v. *Lavine, supra,* 415 U.S. at 543-45. In interpreting the statute and the regulation, it might be advisable for the district court to seek the views of the Department of Health, Education and Welfare. Finally, it was indicated at oral argument that plaintiff may again have applied for status as a lawful resident. If such status is granted, the district judge should consider whether the controversy is rendered moot. See *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 99-101 (1974).

Reversed and remanded.

(Footnote continued from preceding page)

and other services, as far practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .

42 U.S.C. § 602 provides:

(a) A State plan for aid and services to needy families with children must . . . (10) provide . . . that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . .

42 U.S.C. § 606(b)(1) defines "aid to families with dependent children" to include payments and services "to meet the needs of the relative with whom any dependent child is living."

APPENDIX "C"

(Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS
For The
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of February one thousand nine hundred and seventy-six.

Present: Hon. Robert P. Anderson,
Hon. Wilfred Feinberg,
Hon. William H. Mulligan,
Circuit Judges.

Gayle McQuoid Holley, individually and on behalf of James McQuoid, Norman McQuoid, Thomas McQuoid, Douglas McQuoid, Michael McQuoid, and Adelaine McQuoid, her minor children,

Plaintiffs-Appellants,

v.

Abe Lavine, as Commissioner of the New York State Department of Social Services, and James Reed, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

75-7468

UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT
FILED
FEBRUARY 3, 1976
A. DANIEL FUSARO,
CLERK

Appendix "C"—Judgment of the Court of Appeals.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk,
By Vincent A. Carlin,
Chief Deputy Clerk.

APPENDIX "D"

(Order of Court of Appeals Denying Motion for Enlargement of Time to Petition for Rehearing)

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of March, one thousand nine hundred and seventy-six

---

Gayle McQuoid Holley, individually and on behalf of James McQuoid, Norman McQuoid, Thomas McQuoid, Douglas McQuoid, Michael McQuoid, and Adelaine McQuoid, her minor children,

Plaintiffs-Appellants,

v.

Abe Lavine, as Commissioner of the New York State Department of Social Services, and James Reed, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT
FILED
MAR 17, 1976
A. DANIEL FUSARO,
CLERK

Appendix "D"—Order of Court of Appeals Denying Motion for Enlargement of Time to Petition for Rehearing.

It is hereby ordered that the motion made herein by counsel for the appellees dated March 2, 1976 to recall the mandate and stay its reissuance and for leave to file a petition for rehearing today be and it hereby is denied

It is further ordered that

WILFRED FEINBERG,
Wilfred Feinberg,

ROBERT P. PANDERSON,
Robert P. Panderson.

WILLIAM H. MULLIGAN,
William H. Mulligan,
Circuit Judges.

APPENDIX "E"

(The Complaint)

UNITED STATES DISTRICT COURT

Western District of New York

GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID and ADELAINE MCQUOID, her minor children,

Plaintiffs,

against

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants.

Civil Action
No. 75-151

I.

PRELIMINARY STATEMENT

1. This action challenges the validity of section 131-k of the New York State Social Services Law and the regulation of

the New York State Department of Social Services promulgated thereunder, section 349.3 of Title 18 of the New York Code of Rules and Regulations which, as enacted and applied by the defendants, operate to deprive aliens residing in the United States under color law, and their families, of their right to public assistance under the New York State program of Aid to Dependent Children.

2. Section 131-k (1) of the New York State Social Services Law, as enacted and applied by defendants, operates to deprive plaintiffs of rights secured by the Fourteenth Amendment to the Constitution of the United States, the Civil Rights Act of 1871, 42 U.S.C. §1983, of the Social Security Act, 42 U.S.C. §301, *et seq.* and regulations promulgated thereunder.

II.

JURISDICTION

3. Jurisdiction is conferred upon this Court by 28 U.S.C. §1343, and by 28 U.S.C. §1331, as the matter in controversy exceeds $10,000.00 and arises under the Constitution and laws of the United States.

III.

PLAINTIFFS

4. The plaintiff Gayle McQuoid Holley is a citizen of Canada. She has been a resident of the United States since 1954. She presently resides in Monroe County, New York.

5. The plaintiffs James McQuoid, age 14, Norman McQuoid, age 13, Thomas McQuoid, age 12, Douglas McQuoid, age 11, Michael McQuoid, age 9, and Adelaine

McQuoid, age 1, are the children of the plaintiff Gayle McQuoid, citizens of the United States by birth, presently residing with the plaintiff Gayle McQuoid Holley, in Monroe County, New York.

IV.

DEFENDANTS

6. The defendant Abe Lavine is the Commissioner of the Department of Social Services of the State of New York. He is chief administrator of that department and is responsible for exercising general supervision over the work of all local social service officials in New York, pursuant to section 34 of the New York State Social Services Law.

7. The defendant James Reed is the Commissioner of the Department of Social Services of Monroe County, New York. He is responsible for the general supervision of that department, pursuant to section 65 of the New York State Social Services Law.

V.

STATEMENT OF FACTS

8. The plaintiff Gayle McQuoid Holley was born in Ontario, Canada on August 22, 1942. She first entered the United States in 1954, as a nonimmigrant student. She resided in the state of Vermont from 1954 until 1958. In 1958 she returned to Canada for a period of approximately three months and then reentered the United States. She has resided continuously in the state of New York since 1958.

9. The Immigration and Naturalization (hereinafter, the Service) has knowledge of the residence of the plaintiff Gayle

McQuoid Holley in the United States. The Service has classified her as a deportable alien, pursuant to the provisions of the Immigration and Naturalization Act. The Service, in its discretion, has determined not to deport her, for humanitarian reasons, so long as her citizen children remain dependent upon her. [See Exhibit "A", attached hereto.]

10. In 1970, the plaintiff Gayle McQuoid Holley applied to the Immigration and Naturalization Service for status as an immigrant alien. Her application was denied on the ground that she was a public assistance recipient; and pursuant to the provisions of the Immigration and Naturalization Act, a person receiving public assistance is ineligible for immigrant status.

11. Since 1968 the plaintiff Gayle McQuoid Holley has been the recipient of a public assistance grant of Aid to Dependent Children on behalf of herself and her minor children, pursuant to Title 10 of Article 5 of the New York State Social Services Law.

12. The New York State legislature enacted section 131-k of the Social Services Law, effective June 7, 1974, which provides that any person who is an alien unlawfully residing in the United States shall be ineligible for public assistance in the aid to dependent children category.

13. The New York State Department of Social Services promulgated section 349.3 of Chapter II of Title 18 of the New York Code of Rules and Regulations, and released Administrative Letter 74 ADM-110, effective August 1, 1974, directing local social services agencies to implement section 131-k of the Social Services Law.

14. On August 20, 1974, the Monroe County Department of Social Services mailed to the plaintiff Gayle McQuoid Holley a notice of intent to reduce the public assistance grant

for the seven (7) plaintiffs by the amount allocated to meet the needs of the plaintiff Gayle McQuoid Holley, for the reason that the plaintiff's alien status made her ineligible for public assistance. This proposed reduction would result in a loss of $50.33 per month to the McQouid family household. [A copy of the Notice of Intent is attached hereto as Exhibit "B".]

15. The plaintiff Gayle McQuoid Holley promptly requested that an administrative fair hearing be held by the New York State Department of Social Services to review the determination of the Monroe County Department of Social Services to reduce the plaintiffs' public assistance grant.

16. A fair hearing was scheduled by the New York State Department of Social Services to be held on September 24, 1974 and was adjourned, at the request of the Monroe County Department of Social Services, until October 22, 1974.

17. Since the request for a fair hearing was timely made by the plaintiff Gayle McQuoid Holley, the public assistance grant continued unchanged pending the outcome of the fair hearing.

18. A fair hearing was held on October 22, 1974 at Rochester, New York, before a hearing officer employed by the New York State Department of Social Services.

19. The defendant Abe Lavine rendered a fair hearing decision on December 19, 1974, affirming the determination of the Monroe County Department of Social Services to reduce the monthly public assistance grant of the seven (7) plaintiffs by removing the plaintiff Gayle McQuoid Holley from the grant, because she is an alien unlawfully residing in the United States. [A copy of the fair hearing decision is attached hereto as Exhibit "C"]

20. The Monroe County Department of Social Services has implemented the fair hearing decision of the defendant Lavine by reducing the public assistance grant of the McQuoid household by the amount of $91.99 per month, which is one seventh of the seven member household grant, effective January 15, 1975.

21. Since January 15, 1975, the seven (7) plaintiff members of the McQuoid household have been required to live on a budget that is only six sevenths of the amount determined by the New York State legislature to be the public assistance level for a family of seven (7).

22. On Feburary 25, 1975 the plaintiff Gayle McQuoid Holley married Wayne Holley, a resident of Monroe County, New York. The marriage has no effect upon the eligibility of the seven (7) plaintiffs for public assistance since Wayne Holley, the recipient of a separate public assistance grant for which eligibility is based on disability, is unable to contribute and does not in fact contribute to the support of Gayle McQuoid Holley or her six (6) minor children.

VI.

FIRST CAUSE OF ACTION

23. Plaintiffs restate, reallege and incorporate each and every allegation in paragraphs 1-22.

24. The Social Security Act, 42 U.S.C. §301 *et seq.* is the federal statutory authority governing the New York State program of Aid to Dependent Children. Section 401 of the Social Security Act, 42 U.S.C. §601 provides:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable

> under the conditions in such State, *to needy dependent children and the parents or relatives with whom they are living* to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children (Emphasis added).

Section 402 (a) (10) of the Social Security Act, 42 U.S.C. §602 (a) (10) provides in pertinent part:

> A State plan for aid and services to needy families with children must. . .provide. . .that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.

Section 406 (b) (1) of the Social Security Act, 42 U.S.C. §606 (b) (1) provides in pertinent part:

> The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living. . .

25. Since New York State receives federal support for its program of Aid to Dependent Children, the state plan for distribution of the federal funds must conform with, and must include for eligibility all persons defined as eligible under, federal law.

26. The plaintiff Gayle McQuoid Holley is the parent with whom six needy dependent children reside, and so the needs of Ms. Holley must be provided for by the State pursuant to sections 401, 402 (a) (10) and 406 (b) (1) of the Social Security Act.

27. Section 131-k of the New York State Social Services Law, as enacted and applied by defendants, operates to reduce the McQuoid household public assistance grant by the amount of the needs of the parent member Gayle McQuoid Holley.

28. Section 131-k of the New York State Social Services Law, as enacted and applied by defendants, is invalid in that it is inconsistent with, and operates to defeat the purposes of, the Social Security Act.

VII.

SECOND CAUSE OF ACTION

29. Plaintiffs restate, reallege and incorporate each and every allegation in paragraphs 1-28.

30. The regulations promulgated by the Department of Health Education and Welfare to implement the provisions of the Social Security Act, 45 C.F.R. §3.1 *et seq.*, are the federal regulatory authority governing the program of Aid to Dependent Children in New York.

31. 45 C.F.R. §233.50, effective January 1, 1974, provides that every state plan for Aid to Dependent Children shall include for eligibility the following persons:

> An otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act).

32. The plaintiff Gayle McQuoid Holley is permanently residing in the United States under color of law, and so is eligible for public assistance pursuant to federal eligibility standards.

33. Section 131-k of the New York State Social Services Law, as enacted and applied by the defendants is invalid in that it is inconsistent with, and operates to exclude from eligibility for public assistance persons defined as eligible under, the controlling federal regulatory authority.

VIII.

THIRD CAUSE OF ACTION

34. Plaintiffs restate, reallege and incorporate each and every allegation in paragraphs 1-33.

35. The Fourteenth Amendment to the Constitution of the United States provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

36. Section 131-k of the New York State Social Services Law, as enacted and applied by the defendants, deprives the

plaintiffs of their rights to equal protection and due process of law. As a result, plaintiffs are denied rights secured by the Fourteenth Amendment to the Constitution of the United States.

IX.

FOURTH CAUSE OF ACTION

37. Plaintiffs restate, reallege and incorporate each and every allegation in paragraphs 1-36.

38. The Civil Rights Act of 1871, 42 U.S.C. §1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

39. Section 131-k of the New York State Social Services Law, as enacted and applied by defendants, under color of state law, deprives plaintiffs of rights secured by the Constitution and laws of the United States. Accordingly, plaintiffs are being denied rights secured by the Civil Rights Act of 1871, 42 U.S.C. §1983.

WHEREFORE, plaintiffs respectfully request that this Court:

1. Declare that section 131-k, as enacted and applied by the defendants, is invalid in that it is inconsistent with federal laws and regulations, and violates rights secured to the plaintiffs by the Constitution and laws of the United States.

2. Issue a temporary restraining order, preliminary injunction, and permanent injunction restraining defendants from enforcement of section 131-k of the New York State Social Services Law.

3. Convene a Three-Judge Court, pursuant to the Three Judge Court Act, 28 U.S.C. §2281, *et seq.*, to hear and determine plaintiffs' constitutional challenge to section 131-k of the New York State Social Services Law.

4. Grant to plaintiffs damages in the amount of public assistance benefits denied to them as a result of the operation of section 131-k of the New York State Social Services Law.

5. Allow plaintiffs their costs, disbursements, attorney fees, and such other relief as the Court may deem equitable, just and proper.

Dated: April 17, 1975.

MARGARET M. MAHONEY, ESQ.,
K. WADE EATON, ESQ.,
Greater Up State Law Project,
Monroe County Legal Assistance
Corporation,
80 West Main Street,
Rochester, New York 14614,
Tel: (716) 454-6500,
Attorneys for Plaintiffs.

Appendix "E"—The Complaint.

Exhibit "A".

UNITED STATES DEPARTMENT
OF JUSTICE

Immigration and Naturalization Service
United States Court House
Buffalo, New York 14202

Please Refer to this File Number
A10 370 151(DD)

October 16, 1974 Phone: 842-3603

Lawrence F. Tranello, LLB
Chief Legal Counsel
County of Monroe
Department of Social Services
111 Westfall Road
Rochester, N.Y. 14620

Dear Mr. Tranello:

Referendum is made to your letter of September 18, 1974, concerning Gayle McQuoid, alien registration number A10 370 151.

The records of this Service indicate Mrs. McQuoid, formerly Miss Dianne Gayle Rivers, was born in Smith Falls, Ontario, Canada, on August 22, 1942. She first entered the United States as a nonimmigrant student on June 30, 1958. Her last entry was apparently on January 2, 1969, at which time she falsely claimed to be a returning lawful permanent resident of the United States.

On September 6, 1959, she married Norman Stanley McQuoid. Five children, natives and citizens of the United States, were born of this marriage. She has allegedly been separated from Mr. McQuoid since August of 1966. It is my

understanding that subsequently she gave birth to a sixth child, father not known.

Although Mrs. McQuoid is illegally in the United States, deportation proceedings have not been instituted against her for humanitarian reasons relating to her six United States citizen children. So long as she is receiving public assistance, she is ineligible for an immigrant visa, for which she might otherwise be eligible.

This Service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with circumstances then existing.

If I may be of further assistance, please advise.

Very truly yours,

GLENN A. BERTNESS,
District Director.

Appendix "E"—The Complaint.

Exhibit "B".

MONROE COUNTY DEPARTMENT OF
SOCIAL SERVICES
(Illegible)
Rochester, New York
443-4000

Notice Of Intent To:
[x] Reduce
[ ] Discontinue
[ ] Suspend
[x] Public Assistance
[ ] Medical Assistance Authorization

To Ms. Gayle McQuoid
91 Ross St.
Rochester, N.Y.

"Please disregard previous notice"

Case Number 85855
Category ADC
Date August 20, 1974

This is to advise you that this department intends to:

[x] Reduce From 513.83 to 463.50
[ ] Discontinue
[ ] Suspend

your [x] Public Assistance Grant [ ] Medical Assistance Authorization on September 19 for the following reason(s)

Your alien status has deemed you to be inelligible for public assistance. You will be removed from the case and your pro-rated share of the grant will be withheld. Your family will continue to receive their pro-rated share of the grant.

*It is important for you to note that even though the medicaid card in your possession has an expiration date the end of the month, you are not eligible to use this card beyond ..... Use of your medicaid card beyond this date is illegal and prohibited.

[ ] Bulletin Reference cited above
[x] Bulletin Reference see number 13 on reverse side.

You may have a conference at this department to review your case at any time before the proposed date of the action noted above.

I. LARRABEE
Signed
8/20/74
Date

Right To A Fair Hearing

If you believe that this action should not be taken, you may request a state fair hearing by telephoning 454-4272 or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of the hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why the action should not be taken as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date the action is proposed to be taken, you will continue to receive your assistance unchanged until the fair hearing decision is issued. If you need help in the fair hearing, contact one of the following community legal services: Legal Aid Society at 232-4090 or Monroe County Legal Assistance Corporation at 325-2520.

Appendix "E"—The Complaint.

Exhibit "C".

DECISION AFTER FAIR HEARING.

STATE OF NEW YORK

Department of Social Services

In the Matter of the Appeal

of

GAYLE MCQUOID from a determination by the Monroe County Department of Social Services (hereinafter called the agency).

A fair hearing was held at 36 Main Street West, Rochester, New York, on October 22, 1974, before Thomas J. Mahoney, Hearing Officer, at which the appellant, the appellant's representatives and representatives of the agency appeared. The Appeal is from a determination by the agency relating to the adequacy of a grant of aid to dependent children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant is a recipient of a grant of aid to dependent children for herself and six children. On August 16, 1974, the agency determined to reduce appellant's grant by removing her from the budget. The agency's determination was based on its decision that appellant is an alien residing in the United States unlawfully.

(2) Appellant is an alien. Her children are native born citizens.

(3) The United States Department of Justice, Immigration and Naturalization Service has determined that appellant is illegally in the United States. It does not contemplate enforcing her departure from the United States for humanitarian reasons relating to her six children.

(4) The agency sent a Notice to Reduce appellant's grant on August 20, 1974, to be effective September 10, 1974. The appellant requested a fair hearing to review the agency's proposed action on August 19, 1974. The agency was notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued. The agency has continued assistence unchanged to the appellant through the date of this hearing, and the agency has stated that assistance will be continued until a fair hearing decision is issued.

Section 349.3 of the Regulations of the State Department of Social Services provides that an alien who is unlawfully residing in the United States is not eligible for public assistance. The credible evidence establishes that appellant is an alien illegally residing in the United States. The evidence further establishes that appellant had a fair hearing on this same issue on January 17, 1974, at which time the agency's determination to discontinue assistance to the appellant was reversed.

However, that decision was properly made pursuant to provisions of law in effect at the time of the decision. The New York State Social Services Law was amended effective April 1, 1974, to provide that an alien who is unlawfully residing in the United States is not eligible for public assistance. Accordingly, the determination of the agency to

reduce appellant's grant by removing her from the budget is proper.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York.

ABE LAVINE
Commissioner
By Carmen Shang
Assistant Commissioner